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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GEORGE C. FLICK, Petitioner.	2 CA-CR 2010-0330-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR9100182

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Joseph P. DiRoberto
By Joseph P. DiRoberto
Bisbee
Attorney for Petitioner

B R A M M E R, Presiding Judge.

¶1 Petitioner George Flick seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Flick has not sustained his burden of establishing any such abuse here.

¶2 Pursuant to a plea agreement, Flick was convicted of two counts of attempted child molestation in 1991. The trial court suspended the imposition of sentence and placed Flick on lifetime probation on one count and imposed a ten-year term of imprisonment on the other. In 2001,[1] Flick signed documents setting forth the conditions of his probation, including special conditions for sex offenders. He subsequently was placed on intensive probation supervision ("IPS") as well.

¶3 In 2005, Flick's probation officer filed and ultimately moved to dismiss a petition to revoke probation. Thereafter, in 2008, Flick's probation officer filed a "petition to clarify conditions of probation," noting Flick had "deviat[ed] from his approved weekly IPS schedule without the prior permission of his IPS team and his whereabouts were unknown for brief periods of time." The officer asked the trial court to hold a hearing to "convey to [Flick] that his behavior will not be tolerated" and would result in the filing of another petition to revoke his probation. The court held the hearing and Flick apparently acknowledged he understood the conditions of his probation and his probation officer's concerns.

¶4 Approximately a year later, Flick's probation officer filed a petition to revoke his probation, alleging Flick had been at a Peter Piper's Pizza restaurant, a location not approved by his IPS team, in violation of the conditions of his probation. Flick admitted having violated the terms of his probation. The trial court revoked his

[1]Flick was released from prison in 1998, but the Cochise County Attorney filed a petition for detention, attempting to have Flick designated a sexually violent person. The petition ultimately was dismissed and Flick was released from the Arizona State Hospital in 2001.

probation, found suspension of sentence inappropriate, and imposed a ten-year, presumptive term of imprisonment.

¶5 Flick then initiated Rule 32 proceedings, arguing in his petition that the trial court had lacked jurisdiction to revoke his probation because its terms did not prohibit him from going to the restaurant, the court had considered privileged information in its sentencing proceedings in violation of A.R.S. § 13-4066, and it had abused its discretion in imposing a ten-year term of imprisonment. The court summarily denied Flick's petition for post-conviction relief.

¶6 On review Flick essentially reiterates the arguments he made below and contends the trial court abused its discretion in rejecting them. We cannot say the court abused its discretion in finding without merit Flick's claims that it had lacked jurisdiction to revoke his probation and had abused its discretion in imposing the presumptive, ten-year prison term. The court clearly identified those claims and resolved them correctly in a thorough, well-reasoned minute entry, which we therefore adopt in part. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly rules on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court['s] rehashing the trial court's correct ruling in a written decision").

¶7 As to Flick's remaining claim based on § 13-4066, although we agree with the trial court's conclusion that he is not entitled to relief, we find its reasoning incomplete.[2] Section 13-4066(A) provides:

> Any statement that is made by a person who undergoes sex offender treatment that is ordered by the court or that is provided by the state department of corrections or the department of juvenile corrections to a person who is convicted of an offense listed in chapter 14 or 35.1 of this title and any evidence that results from that treatment is not admissible against the person in any criminal or juvenile delinquency proceeding unless the person consents, except that the statement or evidence may be used pursuant to rule 404 (b) and (c), Arizona rules of evidence.

Based on this language, Flick argues on review, as he did below, that the court erred in considering information arising from his sex-offender treatment contained in a predisposition report.

¶8 The report contained information about Flick's treatment at Psychological and Consulting Services ("PCS") from 2001 through 2005, as well as information about treatment he received at Counseling and Consulting Services ("CCS") from 2005 to the time of disposition. The report explained that PCS had terminated Flick from treatment after he repeatedly had admitted masturbating to images of minor children. It also stated Flick's PCS therapist had placed Flick "in a high risk category for recidivism." The report contained additional information about Flick's treatment at CCS. It described his

[2]We also note that Flick did not object on the grounds presented here either at sentencing or in response to the predisposition report. Pursuant to Rule 32.2(a)(3), the trial court therefore could have denied relief solely because the claim was precluded. This is so even if the error alleged could be characterized as fundamental. *See State v. Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d 945, 958 (App. 2007).

treatment routine, stated Flick "had admitted to continued deviant masturbation," and detailed how he had "minimized the situation" at Peter Piper Pizza.

¶9 The report further set forth a "[p]olygraph history summary," which included admissions Flick had made in connection with the polygraph testing that was part of his treatment. And, the report also included information about concerns Flick's IPS team had raised about how he had been traveling past a Tucson school to get to his treatment appointments, even though it was not the most direct route, and had been seen in his yard watching children as they walked home from school. Although that information was apparently from IPS, the report noted "[t]hese issues were also addressed in his counseling sessions."

¶10 At the disposition hearing, the trial court pointed out that although Flick's violation was the first that had been proven or admitted to, it was not "the first violation." The court noted Flick had traveled past the school, the earlier petition to revoke that had been withdrawn, and the hearing held to clarify the terms of his probation and the importance of his not going "anywhere that hadn't been approved." It also pointed out that "based on the information in the report" and Flick's original presentence report, he "[h]ad a history" of "minimizing" his actions.

¶11 In its subsequent ruling on Flick's petition for post-conviction relief, the trial court explained in detail the extent to which it had relied upon the predisposition report in reaching its sentencing decision. The court stated it had been "far more concerned about the more recent information" relating to Flick's actions after he was terminated from PCS, specifically his traveling past the school and watching children

from his yard. Although the court conceded it could not say it had "paid no attention" to the PCS information, it stated expressly that had that information been deleted, "the result would have been [the] same."

¶12 Even assuming that § 13-4066 applies to statements or other information contained in a predisposition report like the one at issue here, we agree with the trial court that Flick failed to state a colorable claim for Rule 32 relief on this issue. As the court pointed out, Flick signed a consent that allowed his probation officer to receive information from his treatment at CCS. A probation officer is "part of the judicial function," *State v. Pima County Adult Prob. Dep't*, 147 Ariz. 146, 148, 708 P.2d 1337, 1339 (App. 1985), and is required by statute to "[m]ake and file a complete record of persons placed under suspended sentence by the court, and of all reports made to the officer in writing or in person, in accordance with the conditions imposed by the court," A.R.S. § 12-253(1). The officer is also required to "[o]btain and assemble information concerning the conduct of persons placed under suspended sentence and report the information to the court" and to "[b]ring defaulting probationers into court when in the probation officer's judgment the conduct of the probationer justifies the court to revoke suspension of the sentence." § 12-253(6), (7). Thus, by consenting to share this information with his probation officer, Flick consented to its use in managing his case in accordance with the statutory requirements, including providing the information to the court during its consideration of a petition to revoke his probation.

¶13 As the trial court also noted, however, some statements and evidence contained in the predisposition report related to treatment that was not subject to Flick's

consent, particularly his treatment at PCS. Thus, that evidence was used by the court without Flick's consent, which arguably was unlawful under § 13-4066. And, the ground for relief provided in Rule 32.1(c) "encompasses a claim that a sentence was not imposed in compliance with the relevant sentencing law, at least for a sentence imposed on a pleading defendant." *State v. Cazares*, 205 Ariz. 425, ¶ 4, 72 P.3d 355, 356 (App. 2003). But as noted above, the court specifically stated that even in the absence of that evidence it would have revoked Flick's probation and imposed the presumptive prison term. Therefore, even accepting that the court erred insofar as it considered to some extent information not subject to Flick's consent, he has not established that the outcome of the proceeding would have been different had it not done so. *See State v. Bowers*, 192 Ariz. 419, ¶ 10, 966 P.2d 1023, 1026 (App. 1998) ("In order to receive an evidentiary hearing, the Petitioner must present a 'colorable claim'—one which, if true, would have changed the outcome of the proceeding."). Thus, although we grant the petition for review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge